Supreme Court, U.S.
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No. 93-7407

In The

Supreme Court of the United States

October Term, 1994

ROBERT O'NEAL,

Petitioner,

vs.

FRED McANINCH, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE STATE HAS THE BURDEN OF PROVING A CONSTITUTIONAL ERROR HARMLESS IN A FEDERAL HABEAS CORPUS PROCEEDING UNDER *KOTTEAKOS V. UNITED STATES*, THE CONTROLLING STANDARD FOR FEDERAL HABEAS CORPUS HARMLESS ERROR ANALYSIS.

The parties' opening briefs have successfully narrowed the determinative questions before the Court to a single one – the interpretation of identical language in two, or perhaps three, provisions of federal codified law: 28 U.S.C. § 2111, Fed. R. Crim. P. 52(b), and Fed. R. Civ. P. 61. First, the parties agree that this Court's decision in *Kotteakos v. United States*, 328 U.S. 750 (1946), is now authoritative in habeas corpus harmless error analysis, and that *Kotteakos* "is grounded in the federal harmless-error rule (28 U.S.C. § 2111)." *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993). *See* Brief for Respondent at 12. The federal harmless error rule provides:

> **Harmless error**
>
> On the hearing of any . . . case, the court shall give judgment after an examination of the record without regard to errors or defects which *do not affect the substantial rights of the parties* . . .

28 U.S.C. § 2111 (emphasis added).

Second, the parties also agree, *see* Brief for Respondent at 30-31, based on *Brecht*, that the Court's decision in *United States v. Lane*, 474 U.S. 438 (1986), is authoritative in habeas corpus harmless error analysis. *See Brecht*, 113 S. Ct. at 1722 (quoting *Lane*, 474 U.S. at 449). *Lane* addressed the question whether a violation of Fed. R.

Crim. P. 8(b) in the joinder of federal criminal defendants was harmless. *Brecht* cites page 449 of *Lane* where three points are made. To begin with, *Lane* notes that, because the violation arose under the Federal Rules of Criminal Procedure, the harmless error question in the case was controlled by the Rules' own harmless error provision, Fed. R. Crim. P. 52(a). 474 U.S. at 449. Additionally, *Lane* concludes that, given the "similar language" in Rule 52(a) and in the harmless error statute construed in *Kotteakos*, the interpretation of the rule and the statute are coterminous and interchangeable. *Id.* Then, "[i]nvoking the *Kotteakos* test," *Lane* finds the error before the Court to be harmless under Rule 52(a). 474 U.S. at 449, 459. Thus, a second harmless error provision, Fed. R. Crim. P. 52(a), is authoritative here. Rule 52(a) provides:

> HARMLESS ERROR. Any error, defect, irregularity or variance which *does not affect substantial rights should be disregarded.*

(emphasis added).

Finally, Respondent argues that a third harmless error provision, Fed. R. Civ. P. 61, may be authoritative. Brief for Respondent at 35-36. Civil Rule 61 does not help Respondent. That provision is relied upon in neither *Brecht*, *Kotteakos*, *Lane*, nor any other decision with an obvious relation to this case. Furthermore, the issue is not important because Rule 61 adds nothing to the case, given that (as Respondent admits) the rule uses "language similar to 28 U.S.C. § 2111." Brief for Respondent at 35. *See McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (28 U.S.C. § 2111 "incorporates the same principle as that found in Rule 61"). Fed. R. Civ. P. 61 provides:

> HARMLESS ERROR. . . . The court . . . must disregard any error or defect in the proceeding which *does not affect the substantial rights of the parties.*

(emphasis added). By all accounts, therefore, the single determinative question before the Court – the same question addressed by section 2111, Rules 52(a) and 61, and the Court's decisions in *Kotteakos* and *Lane* interpreting those provisions – is, simply, which party bears the burden of proving that the constitutional "errors" in this case "do *not* affect the substantial rights of the parties." 28 U.S.C. § 2111 (emphasis added). *Accord* Fed. R. Crim. P. 52(a) ("error . . . does *not* affect substantial rights" (emphasis added)); Fed. R. Civ. P. 61 ("error . . . does *not* affect the substantial rights of the party" (emphasis added)). The identical language of all these provisions clearly answers that determinative question. The litigant bearing the burden of proof is the one trying to convince the reviewing court that the errors do *not* affect the substantial rights of the parties. That litigant, of course, is the one who has previously been shown to have committed a violation and who is attempting to avoid relief by demonstrating that the violation is *harmless error.* It is noteworthy that "Harmless error" is the title that Congress gave to section 2111 and that the Court gave to Rule 52(a) (and Rule 61) in promulgating the Federal Rules.

One can easily imagine a *differently* worded provision – one that goes by the title of "Harmful" or "Plain Error" – and limits relief to "errors or defects *affecting* substantial rights." Such statutory language would require the moving party to satisfy not one, but *two*, burdens – first to show that a violation occurred, and then to show that

the violation affected substantial rights. The provision that Petitioner O'Neal (hereinafter O'Neal) postulates here is, of course, one which exists in various forms in federal codified law – for example, in the "Plain Error" provision in Fed. R. Crim. P. 52(b), a provision which, as this Court recently noted, "is paired, appropriately, with Rule 52(a), which governs *non-forfeited* errors." *United States v. Olano*, 113 S. Ct. 1770, 1776 (1993) (emphasis added). Rule 52(b) provides:

> PLAIN ERROR. Plain errors or defects *affecting substantial rights* may be noticed although they were not brought to the attention of the court.

(emphasis added). *Accord, e.g.*, Fed. R. Evid. 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."). Moreover, the differing allocations of the burden of proof postulated above, based on the differing language in the two kinds of provisions, are not O'Neal's invention, but the Court's own interpretation in *Olano*. 113 S. Ct. at 1776. In *Olano*, the Court compared the "Harmless Error" provision in Rule 52(a), which uses the "does not affect substantial rights" formulation, and the "Plain Error" provision in Rule 52(b), which uses the "affecting substantial rights" formulation. The Court began by noting one *similarity* between the two provisions. Both use the same words – referring to the error's influence on "substantial rights" – to define the *standard* of proof:

> This [language from Rule 52(b)] is the same language employed in Rule 52(a), and in most cases it means that the error must have been prejudicial: It must have affected the outcome of the District Court proceedings.

Id. at 1778. This *standard* of proof is the same standard the Court adopted in *Brecht*, both from *Kotteakos* – "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict' " – and from *Lane* – whether the error "resulted in 'actual prejudice.' " *Brecht*, 113 S. Ct. at 1722 (quoting *Kotteakos*, 328 U.S. at 776, and *Lane*, 474 U.S. at 449).

Beyond this similarity in the *standard* of proof, the Court noted an "important difference" in the allocation of the *burden* of proof, which is dictated by the difference in the language ("does not affect" versus "affecting") used in the two types of provisions:

> When the defendant has made a timely objection to an error and Rule 52(a) applies, the Court of Appeals normally engages in a specific analysis of the District Court record – a so-called "harmless error" inquiry – to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, the Court of Appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial. . . . This burden-shifting is dictated by a subtle but important difference in the language between the two parts of Rule 52: while Rule 52(a) precludes error-correction only if the error "does *not* affect substantial rights" (emphasis added), Rule 52(b) authorizes no remedy unless the error *does* "affec[t] substantial rights."

Olano, 113 S. Ct. at 1778. Then, after concluding that the defendants had not met their burden of showing plain error under Rule 52(b)'s "affecting substantial rights" formulation, the Court returned to the distinction between that formulation and the different, "does not affect substantial rights," formulation that the parties agree is dispositive here:

> In sum, respondents have not met their burden of showing prejudice under Rule 52(b). Whether the government could have met *its* burden of showing the absence of prejudice, under Rule 52(a), if respondents had not forfeited their claim of error, is not at issue here. This is a plain-error case, and it is respondents who must persuade the . . . Court that the deviation from Rule 24(c) was prejudicial.

Id. at 1781 (emphasis added).

These and other passages from *Olano* explain why harmless and plain error provisions, using the same "substantial effect" *standard* of proof, allocate the *burden* of proof differently. In the case of a moving party who has made a timely objection, only a single burden of proving the underlying error is imposed. By contrast, in the case of parties who have *forfeited* their claim of error, an additional burden is imposed – that of proving the error to which no objection was made was prejudicial. *Id.* at 1778, 1781. For " '[n]o procedural principle is more familiar to this Court than that a constitutional right,' or a right of any sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' " *Id.*

at 1776 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

O'Neal and Respondent agree the sole issue here is who bears the burden of proof under "the *Kotteakos* standard . . . grounded in the federal harmless-error rule (28 U.S.C. § 2111)." *Brecht*, 113 S. Ct. at 1772. That is, who bears the burden of proving that the constitutional errors at O'Neal's trial did not affect his substantial rights? The simple answer to that question is the one given in *Olano* – "the subtle but important . . . language" of section 2111 and like provisions, which "precludes error-correction only if the error 'does *not* affect substantial rights,' " gives "the Government . . . [the] burden of showing the absence of prejudice . . . . " *Id.* at 1778, 1781.

Respondent attempts several arguments to deflect attention from the clear and decisive language of section 2111, the provision it nonetheless concedes (albeit under compulsion of the Court's decision in *Brecht*) is determinative here. First, Respondent argues that, as a civil or collateral remedy, the habeas corpus review structure should work differently from the direct review structure noted above.[1] Respondent is mistaken. Just as in the

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[1] The Solicitor General also suggests that 28 U.S.C. § 2254(a) somehow affects the burden of proving harmlessness – as opposed to the burden of proving a "violation of the Constitution . . . of the United States." *Id. See* Brief for the United States as *Amicus Curiae* Supporting Respondent (hereinafter Brief for the United States) at 14-15. The Government's point appears to be that, because a habeas corpus court cannot grant relief from a violation unless the violation has contributed to an adverse consequence suffered by the petitioner (*i.e.*, custody), the burden on the harmlessness question should fall on the petitioner.

review structure discussed in *Olano*, this Court has insisted that habeas corpus petitioners who made a timely objection to an error must meet a single burden of showing constitutional error, with the respondent having the burden of showing harmlessness. *See, e.g., Greer v. Miller*, 483 U.S. 756, 761 n.3 (1987). Petitioners who forfeited their claim of error must, as the penalty for their default, meet an additional burden of showing "cause" for the forfeiture and "prejudice" from the error or, alternatively, that the error resulted in a "manifest miscarriage of justice" because it led to the conviction of one who is probably innocent. *See, e.g., Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991); *Murray v. Carrier*, 477 U.S. 478, 489 (1986).

True, in habeas corpus, the applicable *standard* of proof already results in the granting of relief less frequently than in direct appeal cases. *Brecht*, for example, adopted the more forgiving harmless error standard of

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The Government's argument fails in its effort to distinguish habeas corpus from other types of federal review. Whether on direct review in this Court or habeas corpus review in a lower court, a state prisoner cannot secure federal relief on the basis of a federal constitutional trial error that had no impact on the judgment being attacked. Under either mode of review, the absence of any nexus between the violation and the negative consequence that the litigant is trying to remove would forbid relief. The Government's argument thus, simply begs the two questions decided in *Brecht* and presented here – by what *standard* and by what *burden* of proof should that nexus be assessed? On that question, section 2254 is silent. *Kotteakos* and section 2111 are *not* silent, however. Both are dispositive that the standard is "substantial effect" and that the State bears the burden of proving that the "errors . . . do *not* affect the substantial rights of the parties." 28 U.S.C. § 2111 (emphasis added).

Kotteakos ("substantial effect") to replace the less forgiving rule of *Chapman v. California*, 386 U.S. 18 (1967), which applies on direct review. Also, as *Olano* recognizes, the standard for avoiding forfeiture of a claim is higher in habeas corpus cases than in direct review cases. 113 S. Ct. at 1779 ("In our collateral review jurisprudence, the term 'miscarriage of justice' means that the defendant is actually innocent,' " but in direct review contexts the phrase has wider meaning extending to any error that " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings' . . . *independently* of the defendant's innocence" (quoting *United States v. Young*, 470 U.S. 1, 15 (1985), and *United States v. Frady*, 456 U.S. 152, 163 n.14 (1986) (emphasis added)). *See also Frady*, 456 U.S. at 163-66 (to avoid result of forfeiture in collateral context, more than just "plain" error must be shown). The Court consistently has relied upon higher *standards* of proof, not on different allocations of the *burden* of meeting those standards, to distinguish habeas corpus from direct review. This point is evident for the reason already noted: All the parties agree, and as *Brecht* says, "the *Kotteakos* standard [adopted in *Brecht*] is grounded in the federal harmless-error rule (28 U.S.C. § 2111)" and in "the existing body of case law . . . applying it." *Brecht*, 113 S. Ct. at 1722. Furthermore, both the "subtle but important . . . language" of section 2111 and the decisive interpretation of identical language in *Olano* clearly "preclude[] error-correction *only* if the error 'does *not* affect substantial rights.' " *Olano*, 113 S. Ct. at 1778 (first emphasis added; second emphasis in original).

Second, Respondent and *amici* rely on the various federalism and finality-based policy reasons that the

majority in *Brecht* gave for abandoning the *Chapman standard* of proof as reasons to go considerably further and abandon the longstanding, pre-*Chapman* allocation of the *burden* of proof to the proven wrongdoer.[2] The policies on which Respondent relies cannot do the work Respondent assigns them. To begin with, those reasons just sufficed to convince a bare majority of the Court to change the *Chapman standard* of proof – with one member of that

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[2] Respondent cites a few pre-*Kotteakos* decisions allocating the burden of proving harm to the moving party. Brief for Respondent at 22-23. What Respondent fails to point out is that the pre-*Kotteakos* decisions were in conflict, with a number of decisions holding that the harmless error statute assigned the burden of proving the harmlessness of nontechnical violations to the party seeking to benefit from the error. *See, e.g. Little v. United States*, 73 F.2d 861, 865-67 (10th Cir. 1934); *Nicola v. United States*, 72 F.2d 780, 783 (3d Cir. 1934); *Gold v. United States*, 26 F.2d 185, 186 (2d Cir. 1928). The critical point, however, is that it was exactly this conflict that *Kotteakos* undertook to resolve by ruling that where the error is not "technical," ' "the burden of sustaining a verdict will . . . rest upon the one who claims under [the verdict]."' *Kotteakos*, 328 U.S. at 760-61. Nor can the five post-*Kotteakos* court of appeals cases that Respondent marshals (Brief for Respondent at 30) – only one of which was decided in the last 30 years, notwithstanding the hundreds of federal harmless error cases decided each year – stand up to the Court's own decision in *Olano*, which clearly gives the burden of proving harmlessness under the Rule 52(a)/section 2111/*Kotteakos* rule to the State. *See Lane*, 474 U.S. at 449 (equating Rule 52(a) and section 2111/*Kotteakos* standards). *See also, e.g., United States v. Flores*, 968 F.2d 1366, 1372 (1st Cir. 1992); *United States v. Patrick*, 959 F.2d 991, 1002-03 (D.C. Cir. 1992); *United States v. Jefferson*, 925 F.2d 1242, 1255 & n.15 (10th Cir.), *cert. denied*, 112 S. Ct. 238 (1991); *United States v. Rivera*, 900 F.2d 1462, 1469-70 & n.4 (10th Cir. 1990); *United States v. Studley*, 892 F.2d 518, 530 (7th Cir. 1989) (all assuming that the government bears the burden of proving harmlessness under the *Kotteakos* rule).

majority, Justice Stevens, stating that he went along only on the understanding that the burden of proving the new standard would remain with the State. *Brecht*, 113 S. Ct. at 1723-24 (Stevens, J., concurring). Thus, there is nothing in *Brecht* to suggest that the same policies can do the additional heavy lifting that further modification of prior practice would require. In addition, as O'Neal demonstrates in his initial brief, a ruling that would compound *Brecht*'s change in the *standard* of proof to include a change in the longstanding *burden* of proof, would dangerously skew the delicate balance of policies that, on the one hand, favor habeas corpus' continued existence and, on the other hand, favor its limitation to deserving cases. *See* Brief for Petitioner at 30-39. Such skewing of the balance would substantially undermine the Writ's critical capacity to redress constitutional violations and avoid conviction of the innocent. *Id.*

It is suggested that a change in the burden of proof "will only affect cases in which the habeas court is in equipoise as to whether the verdict would or would not have been affected had the claimed constitutional error not occurred . . . ," *see* Brief for the United States at 18, and, in that situation, the habeas remedy should not be available. *Id.* at 16-17. This suggestion is sophistry. The burden of proof will affect every case in which the constitutional error arguably affected the verdict, not only cases in which the effect cannot be determined. In reality, harmless error analysis presents a practical problem for the court in every case because it is inherently difficult and necessarily involves some speculation regarding the jury's decisionmaking process. *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2084 (1993) (Rehnquist, C. J., concurring); *see*

also Brief for Petitioner at 32-34. Given the difficulty of harmless error analysis, there is a greater probability that constitutional errors affecting the verdict will be remedied if the State, rather than the petitioner, is required to bear the burden of proof on harmlessness. Placing the burden of proof on the petitioner "increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial." *Brecht*, 113 S.Ct. at 1730 (O'Connor, J., dissenting).

Moreover, this burden which the government has traditionally borne has not been an onerous one. Few state prisoners who challenge their convictions in federal habeas corpus proceedings obtain relief. *See* Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. Cal. L. Rev. 2507, 2524 n.107 (1993) (habeas corpus relief is granted to roughly 1 in 1,000 state prisoners convicted following a trial). *Accord Brecht*, 113 S. Ct. at 1719; *Estelle v. McGuire*, 112 S. Ct. 475, 482 (1991). Because *Brecht* demonstrably lightened the government's burden of proof regarding harmless error, there is no good reason, from either a policy or practical standpoint, why the government should not continue to bear this traditional burden.

Finally, Respondent argues that *Kotteakos* gave the moving party the burden on the harmlessness question. Respondent's reading of *Kotteakos* is mistaken. Respondent acknowledges that *Kotteakos* divided the range of errors into two mutually exclusive categories – " 'technical' " error and "errors . . . where the 'natural effect is to prejudice a litigant's substantial rights.' " Brief for Respondent at 27-28 (quoting *Kotteakos*, 328 U.S. at 760). Respondent also acknowledges *Kotteakos's* conclusion that only if the error is " 'technical' [does] the burden fall[]

upon the complaining party to show that the result of the error was to affect 'his substantial rights.' " Brief for Respondent at 28 (quoting *Kotteakos*, 328 U.S. at 760). On the other hand, if the error is *not* technical, then "the burden of sustaining a verdict will . . . rest upon the one who claims under [the verdict]." *Kotteakos*, 328 U.S. at 760 (quoted in Brief for Respondent at 28). To acknowledge that *Kotteakos* gives the government the burden except as to "technical" errors, but still conclude that *Kotteakos* gives habeas petitioners the burden of proving harm, would require the Court to hold, as Respondent illogically argues, that violations of trial rights protected by the Constitution of the United States are merely "technical" errors. As untenable as this claim is on its face, it is even more so in historical context. For contemporaneously with *Kotteakos*, the Court defined "technical" errors to be only those that affect the "mere etiquette" and "formalities" of trials and procedure. *Bruno v. United States*, 308 U.S. 287, 293-94 (1939). Surely, the rule that a defendant should not be convicted except upon a jury's finding of proof beyond a reasonable doubt of every element of the crime charged – the trial right at stake in O'Neal's case – qualifies as something more than mere trial "etiquette" or "formalit[y]." *See, e.g., In re Winship*, 397 U.S. 358, 364 (1969); *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979).[3]

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[3] Respondent acknowledges that Ohio law forbade O'Neal's conviction for aggravated murder either as a principal or an accessory unless he, himself, intended that the victim die. Respondent also acknowledges that, contrary to this requirement, the trial court instructed the jury that it could convict if "there was present in the minds of the defendants *or*

This case presents the question whether it is the habeas petitioner, who has proved that he was constitutionally

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codefendants *or* aiders and abettors, if you so find, a specific intention to kill the decedent." (J.A. 170) (emphasis added). Respondent further acknowledges that, over defense objection, the trial court permitted the prosecutor to misinform the jury that O'Neal could be convicted of crimes, including aggravated murder, solely based on a finding that he "participated in a criminal conduct and engaged in a course of criminal conduct which *eventually led* to the commission of those crimes." (J.A. 58) (emphasis added). *See* Brief for Respondent at 5-6 & n.1. It is not disputed that Dimple Podborny paid Gail Toney to kill the victim, and that Gail Toney possessed the victim's property after he disappeared. (J.A. 104-109.) As Respondent's summary of the evidence (Brief for Respondent at 2-3) reveals, moreover, there was no credible direct evidence at trial that O'Neal killed or intended to kill the victim and only sketchy circumstantial evidence that he did. (J.A. 160-61.) Witnesses also testified to O'Neal's actions that aided in Toney's ongoing scheme to defraud and steal from the victim and to commit other unlawful acts short of intentional killing. The simple fact, therefore, is that both the instruction and the prosecutor's argument invited the jury, which had before it only weak evidence of O'Neal's *own* intent to kill, to convict O'Neal by way of an unconstitutional short cut – *i.e.*, by jettisoning the actual-intent-to-kill element of the offense as defined by state law and by finding, as was *conceded*, that there was an intent to kill in the minds of some *other* "aider and abettor" in the "unlawful" conspiracy to which the state linked O'Neal. The trial court's and prosecutor's constitutional violations accordingly are clear. Any ambiguity in the Court of Appeals' finding of those violations (*see* Brief for Respondent at 45; Brief for the United States at 21) thus, can only supply a further reason for remanding the case for a proper harmless error determination. For, as this Court frequently has noted, an error's harmlessness or lack thereof cannot be properly assessed without a careful specification of the error, its extent, and its likely effect on the jurors – an assessment that would not have occurred below if, as

wronged, or the respondent, the wrongdoing party, that bears the burden of showing that the latter's "errors . . . do *not* affect the substantial rights of the [petitioner]." 28 U.S.C. § 2111 (emphasis added). Because the statute, as interpreted in *Kotteakos*, places this burden on the government, the Court of Appeals' allocation to O'Neal of the burden of proof on harmlessness was improper.

Respondent and the Solicitor General claim, the Court of Appeals failed fully to specify the error. *See, e.g., Kotteakos*, 328 U.S. at 764. *See also Brecht*, 113 S. Ct. at 1724 (Stevens, J., concurring).

CONCLUSION

For the foregoing reasons, Petitioner Robert O'Neal requests the judgment of the United States Court of Appeals for the Sixth Circuit be reversed and his case be remanded to that court to determine whether Respondent can demonstrate that the constitutional errors were harmless.

Respectfully submitted,

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APPENDIX

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 8. Joinder of Offenses and of Defendants

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

FEDERAL RULES OF EVIDENCE

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.